SPIEGEL & MCDIARMID

GEORGE SPIEGEL, PC
ROBERT C. McDIARMID
SANDRA J. STREBEL
ROBERT A. JABLON
JAMES N. HORWOOD
ALAN J. ROTH
FRANCES E. FRANCIS
DANIEL I. DAVIDSON
PETER K. MATT
DAVID R. STRAUS
BONNIE S. BLAIR
THOMAS G. TRAUGER
JOHN J. CORBETT
CYNTHIA S. BOSORAD
GARY J. NEWELL
[illegible] STRAUSS
BEN FINKELSTEIN
STEPHEN M. FELDMAN
[illegible] DOWDEN

1350 NEW YORK AVENUE, NW
WASHINGTON, DC 20005-4798

TELEPHONE (202) 879-4000
FACSIMILE (202) 393-2866
EMAIL SPIEGEL@SPIEGEL-MCD.COM

RISE J. PETERS
PETER J. HOPKINS
DAVID E. POMPER
MARK S. HEGEDUS
CAROLYN P. CARMODY
WENDY S. LADER
MATTHEW W. WARD
[illegible] A. SCHWARZ
* MEMBER OF VA BAR ONLY

OF COUNSEL
P. DANIEL BRUNER
MARGARET A. MCGOLDRICK

* KENNETH A. BROWN
PUBLIC AFFAIRS DIRECTOR
* ROBERT I. ROACH
GOVERNMENT AFFAIRS DIRECTOR
* NOT MEMBER OF THE BAR

June 3, 1996

VIA HAND DELIVERY

Mr. William A. Caton
Acting Secretary
Federal Communications Commission
1919 M Street, N.W.
Washington, D.C. 20554

Re: Implementation of the Local Competition Provisions In the Telecommunications Act of 1996; CC Docket No. 96-98.

Dear Mr. Caton:

Enclosed for filing in the above-referenced matter are sixteen (16) copies of Municipal Utilities' second set of Reply Comments, regarding access to rights-of-way, in response to the Commission's Notice of Proposed Rulemaking in the matter of Implementation of the Local Competition Provisions In the Telecommunications Act of 1996; CC Docket No. 96-98. These copies include additional copies for delivery to each Commissioner.

Any questions regarding this matter may be directed to the undersigned.

Sincerely,

James N. Horwood
Scott H. Strauss
Wendy S. Lader

Attorneys for MUNICIPAL UTILITIES

Enclosures

Before The
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

JUN 3 1996

In the Matter of IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC DOCKET NO. 96-98

SECOND SET OF REPLY COMMENTS OF MUNICIPAL UTILITIES

James N. Horwood
Scott H. Strauss
Wendy S. Lader

Attorneys for
MUNICIPAL UTILITIES

Law Offices of:
SPIEGEL & MCDIARMID
Suite 1100
1350 New York Avenue, NW
Washington, DC 20005-4798
(202) 879-4000

June 3, 1996

EXECUTIVE SUMMARY

In this second set of Reply Comments Municipal Utilities expand upon positions taken in that portion of their Initial Comments filed on May 16, 1996, discussing rights-of-way issues.

First, Municipal Utilities urge the Commission not to adopt regulations that would hinder the operation of joint use agreements for pole attachments. Municipal Utilities have found that these agreements are effective and serve to prevent unnecessary duplication of identical facilities.

Second, Municipal Utilities urge that the Commission not adopt a single set of standards governing safety and reliability issues because those issues are highly fact-specific and can only be determined on a case-by-case basis.

Third, Municipal Utilities similarly urge that the Commission not set a national standard for determining when there is insufficient capacity, but accord the utility discretion in making that determination.

Fourth, the Commission should establish that "non-discriminatory" access to rights-of-way means treating *similarly situated* parties equally. Otherwise, the utility should be given discretion as to which party is better suited to gain access to the right-of-way.

Fifth, Municipal Utilities oppose the establishment of a uniform national notice requirement because the type of notice required can vary depending on the individual context.

Finally, Municipal Utilities encourage the Commission to defer consideration of rights-of-way issues and consider all pole attachment issues in the Notice of Proposed Rulemaking on pole attachments which is expected to be released in June 1996.

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FEDERAL COMMUNICATIONS COMMISSION
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In the Matter of

IMPLEMENTATION OF THE LOCAL COMPETITION PROVISIONS IN THE TELECOMMUNICATIONS ACT OF 1996	CC DOCKET NO. 96-98

SECOND SET OF
REPLY COMMENTS OF MUNICIPAL UTILITIES

In accordance with the schedule set forth in the Commission's April 19, 1996, Notice of Proposed Rulemaking, Municipal Utilities submit their second set of Reply Comments in this proceeding. As explained in their Initial Comments, Municipal Utilities is an unaffiliated group of municipalities and publicly-owned electric distribution utilities.[1]

These Reply Comments are limited to access to rights-of-way issues. Although the rights-of-way access provisions do not apply directly to municipally-owned utilities (and are directly applicable only to those municipalities that enter the local exchange carrier business), such utilities have a significant interest in the FCC's deliberations on this issue. As pointed out in their Initial Comments (at 22), Municipal Utilities

> have an interest in this issue to the extent that the LEC pole access requirements may serve as a benchmark for access provided by publicly-owned utilities, whether operating as LECs or leasing dark fiber/rights-of-way to LECs.

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[1] The group consists of: Public Utilities Department, Anaheim, California; Department of Water and Power, Los Angeles, California; Municipal Light Department, Belmont, Massachusetts; Paxton Municipal Light Department, Paxton, Massachusetts; Templeton Municipal Light, Templeton, Massachusetts; Clarksdale Public Utilities, Clarksdale, Mississippi; Board of Commissioners of Public Works, Greenwood, South Carolina.; Harrisonburg Electric Commission, Harrisonburg, Virginia; City of Manassas, Virginia; and City of Philippi, West Virginia.

In addition, Municipal Utilities note that most members of their group (and other municipals across the country) have entered into joint use agreements with their local telephone service providers for reciprocal use of system poles. These agreements are generally long-standing (spanning decades) and establish the standards and procedures by which two or more utilities may jointly use and own the same poles, with engineering done on a joint basis. As a result, the number of poles on public and private property is minimized. Municipal Utilities have found that these joint use agreements work well and serve to prevent unnecessary duplication of identical facilities. Over the decades, significant investment and access decisions have been made based upon the rights contained in joint pole agreements. Municipal Utilities urge that the Commission not adopt regulations that would hinder the operation of such agreements or make it unduly difficult for electric and telecommunications utilities to enter into such pole attachment arrangements in the future. Towards this end, Municipal Utilities support the adoption of regulations along the lines proposed herein.

REPLY COMMENTS

I. THE COMMISSION SHOULD NOT ADOPT NATIONAL STANDARDS TO ADDRESS WHAT ARE, IN ESSENCE, SYSTEM-SPECIFIC ISSUES

Municipal Utilities previously contended that the Commission should not set national rights-of-way access standards, mainly because access disputes involve consideration of system-specific safety and reliability concerns. As explained in Municipal Utilities' Initial Comments, such disputes "are highly fact-specific and can (and *should*) only be determined on a case-by-case basis."

In addition, Municipal Utilities note that attachments to electric utility poles are governed by state regulations (in California, for example, "General Order No. 95" governs overhead utility lines). Where electric and telecommunications wires are sharing the same poles, there cannot be a national standard for one wire and a state standard for another. Thus, any national standards that are adopted need to be consistent with varying state regulatory programs or such federal standards will create unworkable conflicts.

Several commenters argue in response that the Commission should obligate electric utilities to, *inter alia*, decide safety and reliability issues entirely on the basis of an industry-wide code, such as the National Electrical Safety Code ("NESC"). Indeed, a collection of cable companies argue that the NESC should govern even if the utility at issue normally follows standards that are more stringent than the Code (Cable Company Group Comments at 17-18).

Municipal Utilities urge the Commission not to establish a single set of standards, even as embodied in the NESC, as national specifications governing the consideration of safety and reliability issues associated with every potentially available utility pole in the United States. Safety and reliability are critical issues and some utilities apply standards that exceed those embodied in, for example, the NESC. If a utility operates its system in accordance with an approach that is more conservative than the corresponding NESC standards, that utility should not be obligated to compromise its position in order to accommodate additional attachments. Where the utility has an established practice with respect to the evaluation of new attachments, and that practice exceeds the NESC standard, the system-specific standard should govern.

II. THE COMMISSION SHOULD ALLOW THE UTILITY DISCRETION IN DETERMINING WHETHER THERE IS "INSUFFICIENT CAPACITY"

Certain commenters argue that non-discriminatory access means first-come, first-served, and that a strict comparability standard must be observed as between the utility owning the facility and those who seek to use its facilities (AT&T at 15; Frontier Corp. at 6). This position is at odds with the statute, which permits access to be denied where capacity is "insufficient" or in order to meet safety or reliability concerns.

In determining when a utility can deny access to its facilities because of "insufficient capacity," Municipal Utilities suggest that the FCC not set detailed, national standards, but instead adopt regulations that permit the utility discretion to make a capacity sufficiency determination based upon system-specific conditions.[2]

Some commenters claim that a reservation by the utility of pole space for future use should be rejected (*e.g.*, NEXTLINK Communications at 6). Others, including AT&T, claim that some utilities hoard capacity by setting aside capacity based upon anticipated demands over the next three to five years (AT&T at 16). Municipal Utilities urge that the Commission adopt regulations that do not limit the ability of utilities to take reasonably anticipated future use into account in making capacity determinations.

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[2] In the context of electric utility transmission systems, the Federal Energy Regulatory Commission ("FERC") has recognized that in deciding whether capacity is available, consideration may be given to the transmission provider's anticipated future system uses. In its recent Final Rule on open access transmission, the FERC has stated that

> public utilities may reserve existing transmission capacity needed for native load growth and network transmission customer load growth reasonably forecasted within the utility's current planing horizon.

Order No. 888, slip op. at 172.

III. "NON-DISCRIMINATORY" TREATMENT OF THOSE SEEKING POLE ATTACHMENT RIGHTS SHOULD MEAN TREATING *SIMILARLY SITUATED* PARTIES EQUALLY

Municipal Utilities support the position taken by UTC/EEI (at 4) that the Commission should establish that "non-discriminatory" access means treating similarly-situated parties equally. There are many reasons utilities would want to accord different treatment to utilities which are seeking different types of pole attachments, for example. Similarly, utilities should be able to treat differently telecommunications providers that propose to serve only a limited portion of the service community, as compared with those who would offer services to the community as a whole. It should not be deemed discriminatory for a utility, faced with competing applications for limited space, to favor the applicant that proposes to provide service on a universal basis, in comparison to another applicant that seeks to "cream skim" by offering to serve only a few of the community's major telecommunications consumers.

The issue also arises when a telecommunications provider has been allowed to attach to a utility system and additional providers subsequently appear and seek identical treatment. Clearly, any FCC regulations must permit utilities to adopt procedures that are consistent with access rights under existing joint pole agreements. Utilities must be able to continue to honor existing joint pole agreement access rights (which typically include the "who, when and where" of pole access). Within that parameter, utilities should be allowed to establish a first-come, first-served protocol. For example, a utility should be able to establish an "open season" during which those providers seeking pole access are able to make application. The utility can then decide which of the proposed uses is permitted access

to the limited space that is available. Assuming equally-qualified (*i.e.*, similarly situated) providers, the utility would have to adopt procedures that would treat them equally (*e.g.*, a lottery if the providers propose to furnish identical services and there is insufficient space to accommodate both).

Finally, Municipal Utilities disagree with the conclusion reached by UTC/EEI (at 6) and the NU Companies (at 3) that it would not be discriminatory for an electric utility to deny access to all telecommunications providers because it would then be treating the telecommunications providers equally. Unless there are reasons of insufficient capacity, safety, reliability, or other engineering purpose, Municipal Utilities recognize that there is an obligation for public utilities to provide access to its rights-of-way (although no legal obligation pertains to publicly-owned utilities).

IV. THE COMMISSION SHOULD NOT ESTABLISH A FIXED NOTICE PERIOD

The 1996 Act requires that notice be given before pole modifications are made, and the Commission seeks comment (NPRM at ¶ 225) on how much notice is reasonable. Some commenters have recommended ninety days; others have recommended ninety days unless an emergency arises (MFS at 12); and others have advocated sixty days (AT&T at 20).

Again, Municipal Utilities oppose the establishment of a uniform national notice requirement of a particular time period. The type of notice and number of entities which must be given notice can vary depending on the type of modification sought and the pole involved. As with questions of safety and reliability, the question of the type of notice

required is highly individualized and dependent on the particular context. The Commission is therefore in no position to fix a standard which can be applied to all situations. If the Commission establishes any rule on this issue, Municipal Utilities recommend that it establish a range of proper notice periods (such as from 60 to 120 days, for example, except in cases of emergency), rather than establishing a single notice period.

V. THE ISSUES INVOLVED WITH ACCESS TO RIGHTS-OF-WAY SHOULD BE EXAMINED IN THE POLE ATTACHMENTS NPRM

Municipal Utilities support the position of the People of the State of California and the Public Utilities Commission of the State of California ("CPUC" at 6) that the Commission "should look at all of the issues regarding access to rights-of-way in its Pole Attachments NPRM which is scheduled for release next month. In this way, the FCC can deal with the issues comprehensively."

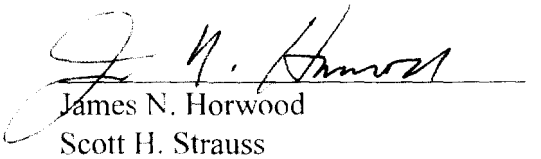
The CPUC opines (at 6) that it is "currently examining rights-of-way issues" and will be including electric utilities in the proceeding and a scheduled workshop. It further observes (at 7) that, based on its experience, "[t]o set rules for sections 251(b)(4), 224(f) and 224(h) at this time would not allow parties sufficient time to analyze the issues."

Municipal Utilities support the CPUC in recommending that the Commission delay consideration of these issues and agree that it is sound policy for the Commission to consider all pole attachment issues in one proceeding.

CONCLUSION

Municipal Utilities urge the Commission's adoption of its positions on the pole attachment requirements presented herein and in its Initial Comments.

Respectfully submitted,



James N. Horwood
Scott H. Strauss
Wendy S. Lader

Attorneys for MUNICIPAL UTILITIES

Law Offices of:
SPIEGEL & MCDIARMID
Suite 1100
1350 New York Avenue, NW
Washington, DC 20005-4798
(202) 879-4000

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